No. 88-37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CARLIN COMMUNICATIONS, INC., SAPPHIRE OF ARIZONA, INC., JOY COMMUNICATIONS OF CALIFORNIA INC., LYNX COMMUNICATIONS OF CALIFORNIA INC., SABLE COMMUNICATIONS OF CALIFORNIA INC., SAPPHIRE OF COLORADO INC., SAPPHIRE COMMUNICATIONS OF FLORIDA, INC., SAPPHIRE OF GEORGIA INC., SAPPHIRE OF IOWA, INC., SAPPHIRE COMMUNICATIONS OF KENTUCKY INC., SAPPHIRE OF LOUISIANA INC., JOY COMMUNICATIONS OF MARYLAND INC., SAPPHIRE COMMUNICATIONS OF MARYLAND INC., JOY COMMUNICATIONS OF MICHIGAN INC., SAPPHIRE OF MICHIGAN INC., SAPPHIRE OF MINNESOTA INC., SAPPHIRE OF NEBRASKA INC., SAPPHIRE OF NEVADA INC., SAPPHIRE OF OREGON INC., JOY COMMUNICATIONS OF PENNSYLVANIA INC., SAPPHIRE COMMUNICATIONS OF PENNSYLVANIA INC., SAPPHIRE COMMUNICATIONS OF TEXAS INC., SAPPHIRE OF VIRGINIA INC., SAPPHIRE OF WASHINGTON INC., and SAPPHIRE OF WASHINGTON D.C. INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

MEMORANDUM FOR THE PETITIONERS IN REPLY

LAWRENCE E. ABELMAN*
NORMAN S. BEIER
PETER J. LYNFIELD
ELIZABETH M. BARNHARD
ABELMAN FRAYNE REZAC & SCHWAB
708 Third Avenue
New York, New York 10017
(212) 949-9022

Attorneys for Petitioners

* Counsel of Record

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Argument	2
Conclusion	4
Appendix B	B-1
Sable Communications of California, Inc. v. F.C.C., Docket No. CV 88-3353 AWT (C.D. Cal. July 19, 1988)	B-1

TABLE OF AUTHORITIES

Page

CASES:

Sable Communications of California, Inc. v. F.C.C., Docket No. CV 88-3353 (AWT) (C.D. Cal. July 19, 1988) 2

STATUTES AND REGULATIONS:

47 U.S.C. § 223(b) (Supp. I. 1983) (amended 1988) 2, 3

F.C.C. - Third Report and Order (FCC 87-143)(May 4, 1987), 52 Fed. Reg. 17,760 (May 12, 1987) 2

No. 88-37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CARLIN COMMUNICATIONS, INC., SAPPHIRE OF ARIZONA, INC., JOY COMMUNICATIONS OF CALIFORNIA INC., LYNX COMMUNICATIONS OF CALIFORNIA INC., SABLE COMMUNICATIONS OF CALIFORNIA INC., SAPPHIRE OF COLORADO INC., SAPPHIRE COMMUNICATIONS OF FLORIDA, INC., SAPPHIRE OF GEORGIA INC., SAPPHIRE OF IOWA, INC., SAPPHIRE COMMUNICATIONS OF KENTUCKY INC., SAPPHIRE OF LOUISIANA INC., JOY COMMUNICATIONS OF MARYLAND INC., SAPPHIRE COMMUNICATIONS OF MARYLAND INC., JOY COMMUNICATIONS OF MICHIGAN INC., SAPPHIRE OF MICHIGAN INC., SAPPHIRE OF MINNESOTA INC., SAPPHIRE OF NEBRASKA INC., SAPPHIRE OF NEVADA INC., SAPPHIRE OF OREGON INC., JOY COMMUNICATIONS OF PENNSYLVANIA INC., SAPPHIRE COMMUNICATIONS OF PENNSYLVANIA INC., SAPPHIRE COMMUNICATIONS OF TEXAS INC., SAPPHIRE OF VIRGINIA INC., SAPPHIRE OF WASHINGTON INC., and SAPPHIRE OF WASHINGTON D.C. INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

MEMORANDUM FOR THE PETITIONERS IN REPLY

ARGUMENT

Respondents oppose this petition for a writ of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit entered on January 15, 1988 and modified on April 4, 1988 on the ground that judicial review of the FCC's Third Report and Order, F.C.C. 87-143, 2 F.C.C. Rcd 2714 (1987), (A-17-A-28)[1], has been mooted by the recent amendment of Section 223(b). Respondents further oppose this petition on the ground that the appeal to this Court, Docket No. 88-515, by Sable Communications of California, Inc. of the decision by the District Court for the Central District of California which determined the constitutionality of Section 223(b) as amended, is the proper decision for review.[2]

Contrary to respondents' assertion, petitioners have not sought review of that portion of the Second Circuit's decision which upholds the FCC's Third Report and Order. Petition at 13. Petitioners have only asked this Court to review the Second Circuit's rulings on constitutional issues raised by petitioners below which have not been mooted by the amendment of Section 223(b). That amendment restored the language "or indecent", deleted from the statute by the Second Circuit, to prohibit obscene or indecent telephone communications and eliminated all defenses to prosecution. Petition at 10-11, 14-15, 17-18. The analysis and holdings by the Second Circuit on these issues has not been negated by the amendment to Section 223(b). In *Sable Communications of California, Inc. v. F.C.C.*, the District Court in

---

[1] All references in parenthesis beginning with "A- " followed by a number are to the numbered pages of Appendix A annexed to the petition. All references in parenthesis beginning with "B" followed by a number are to the numbered pages of Appendix B annexed hereto.

[2] A copy of the decision in *Sable Communications of California, Inc. v. F.C.C.*, Docket No. CV 88-3353 AWT (C.D. Cal. July 19, 1988) is annexed hereto in Appendix B. It should be noted that the respondents herein have taken an appeal of the California District Court's decision, Appeal No. 88-525.

ruling on the constitutionality of Section 223(b) as amended specifically found that the amendment of Section 223(b) did not affect the validity of the Second Circuit's analysis, which the District Court relied upon, on the issue of whether Section 223(b) creates an impermissible national standard of obscenity (B-4). A decision by this Court would not, as respondents maintain, be an advisory opinion on abstract propositions of law. The issues decided by the Second Circuit are applicable to the amendment of Section 223(b).

Petitioners continue to face a real and present danger of indictment under Section 223(b), Petition at 15-17, for violations which took place prior to July 1, 1988, the effective date of the amendment to Section 223(b). Section 223(b) is governed by a three year statute of limitations. Petitioners disagree with respondents' view that this appeal is moot since the government has targeted them for prosecution and consequently, their liberty is at stake. Petition at 8 (A-146-A-150). Petitioners should not have to wait to be prosecuted before challenging the constitutionality of Section 223(b).

Petitioners respectfully suggest that in view of the similarity of some of the issues raised in this petition for a writ of certiorari and the pending appeal of Sable Communications of California, Inc., No. 88-515, that these two appeals be joined.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE E. ABELMAN*
NORMAN S. BEIER
PETER J. LYNFIELD
ELIZABETH M. BARNHARD
ABELMAN FRAYNE REZAC & SCHWAB
708 Third Avenue
New York, New York 10017
(212) 949-9022

Attorneys for Petitioners

*Counsel of Record

October 19, 1988

APPENDIX

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SABLE COMMUNICATIONS OF CALIFORNIA, INC., etc.,	)	
Plaintiff,	)	NO. CV 88-3353 AWT
v.	)	MEMORANDUM DECISION
FEDERAL COMMUNICATIONS COMMISSION, et al.,	)	
Defendants.	)	

BACKGROUND

Effective July 1, 1988, 47 U.S.C. §223(b) was amended by the Telephone Decency Act to provide:

(1) Whoever knowingly

(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person; or

(B) permits any telephone facility under such person's control to be used for any activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(2) In addition to the penalties for paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each

violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3) (A) In addition to the penalties under paragraphs (1) and (2), whoever in the District of Columbia or in interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either -

(i) by a court, pursuant to a civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(4) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

Plaintiff, a major purveyor of 976 IAS dial-a-porn messages, has moved for a preliminary injunction (the parties having stipulated that pending the hearing, defendants will not enforce §223(b) against plaintiff).

A concrete controversy exists. *See Sable Communications, Inc. v. FCC*, 827 F.2d 640 (9th Cir. 1987) (addressing challenge to pre-amended §223(b)). In fact, plaintiff has been "chilled"– it has "softened" its messages. Since invasion of First Amendment rights is at issue, plaintiff has unquestionably met the irreparable injury requirement. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

INDECENT SPEECH

What is at issue is the breadth to be given to *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). The Court concludes that *Pacifica* does not reach §223(b); thus, that in the final analysis the statute in its present form is overbroad and unconstitutional, at least insofar as it applies to "indecent" communications.

First, *Pacifica* itself emphasized its own narrowness. *Id.* at 750-51. The narrowness of *Pacifica*'s holding was reiterated by the Court in *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983). As the Second Circuit noted:

> *Bolger* thus singles out the broadcasting media as subject to a "special interest of the federal government in regulation" that "does not readily translate into a justification for regulation of other means of communication."

Carlin Communications, Inc. v. FCC, 749 F.2d 113, 120 (2d Cir. 1984) (quoting *Bolger*, 463 U.S. at 74). *See also Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (*Pacifica* does not apply to cable television).

This narrow reading of *Pacifica* is consistent with Ninth Circuit precedent. "The First Amendment does not permit a flat-out ban of indecent as opposed to obscene speech; the adult population may not be reduced to 'hearing only what is fit for child.' " *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1296 (9th Cir. 1987) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957), *cert. denied*, 108 S. Ct. 1586 (1988).

While the government unquestionably has a legitimate interest in, *e.g.*, protecting children from exposure to indecent dial-a-porn messages, §223(b) is not narrowly drawn to achieve any such purpose. Its flat-out ban of indecent speech is contrary to the First Amendment. *Mountain States Tel.*, 827 F.2d at 1296.

OBSCENE SPEECH

On the other hand, obscene speech is unprotected by the First Amendment. *Miller v. California*, 413 U.S. 15 (1973). Plaintiff

does not argue against this well-established proposition. Rather, plaintiff contends that §223(b) abolishes *Miller*'s community standard requirement and, in effect, establishes a single national standard, subjecting its dial-a-porn messages to the most puritanical standard that exists anywhere in the country. The Second Circuit has already addressed this contention and found it wanting:

> We are also unpersuaded by Carlin's remaining facial constitutional challenge to section 223(b). The statute does not create an impermissible national obscenity standard any more than do the federal laws prohibiting the mailing of obscene materials, or the broadcasting of obscene messages.

Carlin Communications, Inc. v. FCC, 837 F.2d 546, 561 (2d Cir. 1988) (addressing pre-amended §223(b)) (citations omitted). In light of this square holding (the amendment of §223(b) does not affect the validity of the Second Circuit's analysis), the Court concludes that plaintiff cannot meet even the alternative test — that a serious question is raised. *American Motorcyclists Ass'n v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983). More importantly, if a preliminary injunction were to issue, it would mean that plaintiff would be free to transmit obscene dial-a-porn messages. Beyond doubt the public interest would be disserved by such a preliminary injunction and effect on the public interest is a factor which the Court must consider. *Id.* at 967.

SEVERABILITY

In view of these divergent conclusions on the two parts of §223(b), the Court must next consider whether the "obscene" and "indecent" components of the statute are severable from each other — whether Congress would have enacted the one without the other. An unconstitutional provision is presumptively severable and that presumption should be applied. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (White, J.) (citations omitted). *See also Brockett v. Spokane Arcade, Inc.*, 472 U.S. 491 (1985) (applying "normal" rule of severability to First

Amendment case to sever "lust" from otherwise constitutional anti-obscenity statute). Here, no reason appears, certainly not at the preliminary injunction stage, not to apply the normal rule of severability.

CONCLUSION

For the foregoing reasons, a preliminary injunction shall issue prohibiting enforcement of §223(b) as to any communication alleged to be "indecent." The motion for a preliminary injunction is othewise denied.

Dated July 19, 1988 /s/ _____

A. WALLACE TASHIMA

United States District Judge